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Nos. 06-84 and 06-100

In The Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, et al.,

Petitioners,

v.

CHARLES BURR, et al.,

Respondents.

GEICO GENERAL INSURANCE COMPANY, et al.,

Petitioners,

v.

AJENE EDO,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICI CURIAE THE NATIONAL CONSUMER LAW CENTER, INC., THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, THE U.S. PUBLIC INTEREST RESEARCH GROUP, THE NATIONAL ASSOCIATION OF CONSUMER AGENCY ADMINISTRATORS, THE CENTER FOR RESPONSIBLE LENDING, AND THE CONSUMER FEDERATION OF AMERICA IN SUPPORT OF RESPONDENTS

RICHARD J. RUBIN
(*Counsel of Record*)
1300 Canyon Road
Santa Fe, New Mexico 87501
(505) 983-4418

JOANNE S. FAULKNER
123 Avon Street
New Haven, Connecticut 06511
(202) 772-0395

CHI CHI WU
NATIONAL CONSUMER LAW CENTER
77 Summer Street, 10th Floor
Boston, Massachusetts 02110
(617) 542-8010

ELIZABETH D. DE ARMOND
Chicago-Kent College of Law
ILLINOIS INSTITUTE OF TECHNOLOGY
565 W. Adams Street
Chicago, Illinois 60661
(312) 906-5172

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF AMICI CURIAE[1]

Amici are public interest organizations with long-standing experience with the consumer reporting and privacy issues implicated by this case. Amici submit this brief to provide the Court with background information about the consumer reporting industry. The brief focuses on the implications that the Court's decision inevitably will have on the broader credit, credit reporting, and privacy aspects of the Fair Credit Reporting Act (FCRA).

The National Consumer Law Center, Inc. (NCLC) is a non-profit Massachusetts corporation specializing in consumer law, with historical emphasis on consumer credit. NCLC is recognized nationally as an expert in consumer credit issues, including fair credit reporting, and has drawn on this expertise to provide information, legal research, policy analyses, and market insights to federal and state legislatures, administrative agencies, and the courts for over 36 years. NCLC is the author of the Consumer Credit and Sales Legal Practice Series, consisting of 16 practice treatises and annual supplements. One volume, Fair Credit Reporting Act (5th ed. 2002 & Supp. 2005), is a standard resource on privacy and the FCRA. Petitioner GEICO relies on this treatise in its Brief. GEICO Brief, at 3 and 25. Among the authors of this treatise are undersigned counsel.

The National Association of Consumer Advocates (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students whose primary

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[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than Amici Curiae, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and serving as a voice for its members as well as consumers in the ongoing effort to curb unfair and abusive business practices. Compliance with federal consumer protection laws in general, and the FCRA in particular, has been a continuing concern of NACA since its inception.

The U.S. Public Interest Research Group serves as the federation of, and the national advocacy office for, state Public Interest Research Groups (PIRGs). PIRGs are non-profit, non-partisan consumer, environmental, and government research and advocacy organizations with one million members around the country. Since 1991, U.S. PIRG and the state PIRGs have published seven investigative reports and surveys on credit bureau errors and identity theft problems, including one joint report with the Privacy Rights Clearinghouse. Congress and state legislatures have used the reports in the development of legislation ranging from 25 state credit report security freeze laws to pro-consumer Congressional amendments enacted in 1996, 1998, and 2003, including the right to a free credit report on request and others responding to accuracy and identity theft problems.

The National Association of Consumer Agency Administrators (NACAA) is a non-profit organization that works with consumers to solve problems, prosecute offenders, advance legislation, and educate the public. NACAA's members are public and private advocates, including more than 160 government agencies and 50 corporate consumer offices in the United States and abroad.

The Center for Responsible Lending (CRL) is a non-profit organization which has directed research and policy work on issues related to preemption, predatory lending,

discrimination in credit markets, and other banking services. CRL's parent organization is the Center for Community Self-Help, whose mission is to create ownership and economic opportunities for minorities, women, rural residents, and low-wealth families. CRL has testified numerous times before Congress, has worked with consumers and consumer organizations on financial services issues both nationally and at the state level, and has appeared frequently as an amicus in cases involving financial services to minorities and low and moderate income families.

The Consumer Federation of America (CFA) is a non-profit association of over 300 non-profit organizations from throughout the nation with a combined membership exceeding 50 million people. CFA was founded in 1968 to advance consumer interest through advocacy and education. CFA has a long history of educating consumers about and advocating for stronger credit reporting consumer protections. For example, CFA has supported the use of adverse action notices for credit and insurance purposes as essential to informing consumers about the higher rates that they may have to pay as a result of their credit or insurance score. In December 2002, CFA and the National Credit Reporting Association issued a report on credit scoring entitled "Credit Score Accuracy and Implications for Consumers." The report documented that millions of Americans could pay more for, or be denied credit, insurance, or utilities because of inaccurate or incomplete credit scores and reports. CFA has conducted consumer knowledge and opinion surveys about credit scoring, documenting that many consumers do not understand basic facts about how credit scores are developed. CFA has also published a free educational brochure for consumers with Fair Isaac Corporation entitled "Your Credit Scores."

SUMMARY OF ARGUMENT

Congress's findings and statement of purpose when it enacted the FCRA, its ongoing oversight, and its recent amendments demonstrate the significance it rightly placed on the integrity and confidentiality of the nation's consumer reporting system. Unfortunately, over the last 35 years, the national consumer reporting agencies have demonstrated an inadequate commitment to conducting their business in a manner commensurate with the grave responsibilities entrusted to them. The resulting systemic deficiencies have heightened the importance of the adverse action notice and statutory civil damages at issue here since they are essential tools that Congress provided consumers to enable them to detect, correct, and seek redress for problems with their own credit reports.

Congress recognized that responsibility for protecting the accuracy and confidentiality of the 600 million individual reports on 200 million Americans maintained in the vast databases of the Big Three consumer reporting agencies is beyond the capabilities of public enforcement agencies.[2] Congress instead gave primary responsibility to the persons with the greatest interest in accomplishing such a task – individual consumers policing their own files and when necessary enforcing the FCRA's private statutory remedies.

Petitioners are seeking a restrictive application of the statutory willfulness standard that would undermine the indispensable private attorney general role that Congress chose as the FCRA's primary enforcement mechanism. Petitioners' position on the willfulness standard would

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[2] The Big Three national consumer reporting agencies, commonly referred to as credit bureaus, are Trans Union, Equifax, and Experian, f/k/a TRW.

undercut the recent concerted efforts of Congress, the Federal Trade Commission, consumer advocacy groups, law enforcement agencies, and ordinary citizens to increase compliance with the FCRA. Relaxing enforcement standards now is particularly untimely and unwarranted. Moreover, Petitioners' legal contention conflicts with other FCRA provisions and is contrary to precedent of the Court.

In recent years Congress targeted the deficiencies of the Big Three reporting agencies in maintaining the integrity of the consumer reporting system. After 25 years of relative inactivity, Congress overhauled the FCRA twice in the last ten years to strengthen its substantive accuracy standards, privacy protections, and private enforcement mechanism. During this process, Congress heard evidence of widespread noncompliance and abuses by all participants in the reporting industry: the Big Three consumer reporting agencies, those who furnish information to the reporting agencies (furnishers), and the end users of the credit reports (users). The efficacy of Congress's efforts to remedy these deficiencies is at stake in this case.

A relatively recent assault on the integrity of the consumer reporting system has emerged in the form of theft of identity, a phenomenon that poses a threat to every American with a credit report. The reporting industry, if it chooses, has the capacity to curtail identity theft, if not to bar virtually all identity thieves from compromising individual credit reports, the *sine qua non* of the offense. Instead, because the industry has chosen not to do so, the dysfunctional consumer reporting system itself has become the vehicle through which these thieves operate.

By attacking the insurance adverse action notice of § 1681a(k)(1)(B)(i), Petitioners propose that the Court eliminate an information-sharing device essential to the FCRA's self-help system. That system relies on consumers monitoring their own reports as the linchpin of its

effectiveness. Consumers who do not receive an adverse action notice consequently do not learn of their right to a free credit report to check its accuracy and to initiate the formal dispute process if any information is inaccurate. Even if the information is accurate, consumers who do not receive the notice are not alerted to the shortcomings in their own credit profile so they can take necessary corrective action to improve their standing. Providing an adverse action notice to consumers who qualify only for a higher insurance premium is particularly important for those identity theft victims who are not active credit users, as this notice may be the only alert they ever receive that their credit profile has been compromised. Petitioners want to deny consumers the adverse action notice that often is their first indication that they are victims of identity theft.

The harmful consequences of Petitioners' contentions are not limited to disrupting the internal workings of the FCRA. Rather, Petitioners' position would upset the interplay between the FCRA and other titles of the Consumer Credit Protection Act and, in turn, impede the efficiency of the open market. Petitioners want to conceal that they are not offering customers the best rate available. This deception prevents consumers from comparison shopping for a better rate and, of course, results in customers unwittingly paying more than they might otherwise pay. Petitioners' putative elimination of the statutorily mandated adverse action notice is an anti-competitive practice in our free market that otherwise relies on informed consumers and honest competition rather than captive customers held in ignorance.

ARGUMENT

A. Congress Enacted the FCRA to Ensure Accuracy and Protect Privacy in Disseminating Consumers' Personal Financial Information

1. Congress Determined That Accuracy and Respect for Privacy Are Essential to a Competitive Credit Economy in the Information Age

Congress enacted the FCRA in the explicit recognition that the health of the consumer banking system "depend[s] upon fair and accurate credit reporting" and that "[i]naccurate credit reports directly impair the efficiency of the banking system." § 1681(a)(1). Congress focused on the "need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right of privacy" and "confidentiality." § 1681(a)(4) and (b). The Court summarized these precepts in its only FCRA decision to date:

> Congress enacted the FCRA in 1970 to promote efficiency in the Nation's banking system and to protect consumer privacy. As relevant here, the Act seeks to accomplish those goals by requiring credit reporting agencies to maintain reasonable procedures designed to assure maximum possible accuracy of the information contained in credit reports and to limit the furnishing of such reports to certain statutorily enumerated purposes.

TRW Inc. v. Andrews, 534 U.S. 19, 23 (2001) (internal quotations, ellipsis, and citations omitted).

In enacting the FCRA, Congress intended to regulate the disclosure of a vast amount of personal information bearing not only on consumers' "credit worthiness, credit standing, [and] credit capacity," but also on their "character, general reputation, personal characteristics, or mode of living." § 1681a(d) (defining "consumer report"). Information about one's finances is particularly sensitive:

"Financial transactions can reveal much about a person's activities, associations, and beliefs." *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring). Many genuine, justifiable purposes exist for using credit reports, and the FCRA explicitly authorizes those uses while prohibiting all others. § 1681b(a) and (f).

Congress's goals in enacting the FCRA are even more critical given the exponential growth in consumer credit over the past several decades. Consumer credit (non-real estate) now comprises one of the largest sectors of the national economy, growing from $6 billion at the end of World War II, to $116 billion in 1970 when Congress enacted the FCRA, S. Rep. 103-209, 103d Cong., 1st Sess., at 2-3 (1993), and most recently passed $2.378 trillion.[3]

The credit reporting industry has similarly expanded to support this phenomenal level of activity. Only 13 years ago the consumer reporting industry maintained credit files on about 110 million individuals and cumulatively processed almost 2 billion pieces of data per month. S. Rep. 103-209, at 3. Now, the databases of the Big Three have almost doubled, containing information on the personal financial habits of 200 million persons, the overwhelming majority of the entire adult population of the country. Brief of Amicus Curiae Trans Union, LLC, at 1. In this same period, the amount of data has tripled, with Trans Union alone processing over 2 billion pieces of data per month in its own database, *id.*, and Experian claiming to receive 50 million updates per day from approximately 40,000 furnishers. *Sarver v. Experian Info. Solutions*, 390 F.3d 969, 972 (7th Cir. 2004).

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[3] Federal Reserve Board Statistical Release, G.19, Consumer Credit, October 2006, Release Date: December 7, 2006, available at <http://www.federalreserve.gov/Releases/G19/Current>.

2. Congress Enacted the Consumer Credit Protection Act to Encourage Informed Use of Credit

Congress enacted the FCRA in 1970 as Title VI of the Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1693r (CCPA), the umbrella act containing the federal statutes regulating the consumer credit industry. Other titles in the CCPA include the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601-1667e; the Equal Credit Opportunity Act (ECOA), 15 U.S.C. §§ 1691-1691f; and the Fair Debt Collection Practices Act, (FDCPA), 15 U.S.C. §§ 1692-1692o. A recurring theme at the heart of the CCPA is that prudent dissemination of credit information is essential to maintain the vitality of the credit granting system in a competitive and open market for the benefit of creditors and consumers alike. Just as Congress enacted the FCRA with the express purpose to enable credit grantors to be in the best position to make reliable lending decisions, TILA establishes the corresponding principle through its disclosure requirements that consumers are best served through their own "informed use of credit." § 1601(a).

"Congress enacted the Truth in Lending Act in part because it believed 'consumers would individually benefit not only from the more informed use of credit, but also from heightened competition which would result from more knowledgeable credit shopping.'" *Till v. SCS Credit Corp.*, 541 U.S. 465, 482 (2004) (quoting S. Rep. No. 368, 96th Cong., 2d Sess. 16, *reprinted in* 1980 U.S.C.C.A.N. 252) (footnote omitted). In addition to the FCRA and TILA, Congress included a further self-help checking mechanism within the CCPA in the ECOA, providing yet another information-sharing standard through its core requirement that creditors disclose, and consumers receive, the specific reasons for any adverse action, such as credit denial. § 1691(d).

The Court stated the guiding principle of this Congressional philosophy over 30 years ago: "[B]lind economic activity is inconsistent with the efficient functioning of a free economic system such as ours." *Mourning v. Family Publication Serv., Inc.*, 411 U.S. 356, 364 (1973). The FCRA was passed with the recognition that credit decisions made on the basis of faulty information, whether by credit grantors or consumers, undermine the vitality of the consumer economy. The successful operation of the consumer credit system is fundamental to the national economy and the ability of Americans to enjoy the fruits of this country's material prosperity. The strength of this system is a function of the soundness of the individual decisions that comprise it. Failure within this system is not only expensive but also severely disruptive, causing "bankruptcies, marital instability, loss of jobs, and invasions of individual privacy." § 1692(a) (FDCPA). Simply put, the viability of our credit economy depends on accurate information; Congress designed the FCRA to increase that accuracy.

B. Private Enforcement is Essential to Ensuring That the Reporting Industry Complies With the FCRA

1. Petitioners Want to Weaken Private Enforcement Remedies at the Very Moment When Congress Has Strengthened Them

Congress clearly recognized the crucial role that consumers play in enforcing the CCPA when it adopted six titles with private attorney general enforcement provisions.[4] No one has a stake in the accuracy or privacy of a

[4] *See* 15 U.S.C. §§ 1635, 1640, and 1667d (TILA); § 1679g (Credit Repair Organizations Act); § 1681n and 1681o (FCRA); § 1691e (ECOA); § 1692k (FDCPA); and § 1693m (Electronic Funds Transfer Act).

credit report like the consumer to whom it relates. While the FTC deals as best it can with systemic issues (§ 1681s), Congress has not funded the army of regulators that would be necessary to monitor the 600 million files that the Big Three maintain. Congress gave that role to each of the individuals whose tranquility and material well-being are determined by these faceless, computer-generated reports. *See Bryant v. TRW Inc.*, 689 F.2d 72, 79 (6th Cir. 1982) (quoting 116 Cong. Rec. 36570 (1970)) ("[A]s Shakespeare said, the loss of one's good name is beyond price and makes one poor indeed").

Congress and the FTC both have reaffirmed the FTC's own limitations and this critical role played by consumers. During the legislative hearings that culminated in the 1996 amendments to the FCRA, the FTC acknowledged that the FCRA "was designed to be largely self-enforcing" and expressed its position directly to Congress that any amendments maintain "the capacity of consumers to bring private actions to enforce their rights under the statute." S. Rep. 103-209, at 6. Congress's response was to strengthen private enforcement by encouraging consumer litigation through the adoption of a specific civil prohibition against unlawful access or use of credit reports (§ 1681b(f)) and the minimum statutory damages now being challenged (§ 1681n(a)(1)). Congress also created for the first time a private right of action allowing a consumer to sue furnishers of information for failing to meet their duties in the reinvestigation process. § 1681s-2(b); *see Nelson v. Chase Manhattan Mtg. Corp.*, 282 F.3d 1057 (9th Cir. 2002).

Congress enacted § 1681n(a) providing statutory and punitive damages for willful noncompliance as the sole consumer tool that might provide an incentive to defendants to comply with the FCRA. Whether one agrees or disagrees with the wisdom of this decision, Congress

exercised its prerogative and chose the award of money damages as its preferred private compliance instrument.[5] Petitioners disagree with that legislative decision, so they are asking for unprecedented and unwarranted relief from the Court.

Amici can add nothing to the persuasive substantive arguments presented in the Brief of the United States as Amicus Curiae applying the Court's prior teaching, showing the context in which Congress adopted § 1681n(a), and expounding the compelling public policy reasons that willful noncompliance includes the "reckless disregard" standard. Amici observe, however, that Petitioners appear unable to explain how Congress could have intended willfulness under § 1681n(a) to generally require a knowledge element when it specifically made knowledge a condition of § 1681n(a)(1)(B).

Petitioners' putative restrictive interpretations would significantly impair the essential consumer self-help role on which Congress constructed the FCRA. Both Petitioners and some of their Amici raise the specter that to affirm the opinion below would disturb the "balance" that Congress imposed within the structure of the FCRA. Safeco Brief, at 35 and 38; Brief of Amicus Curiae Trans Union, LLC, at 5, 6, 7, 8, and 10. In actuality, the statutory

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[5] The power to issue injunctive relief that "federal courts retain" "absent the clearest command to the contrary from Congress," *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979), admittedly at times might be preferable to a suit for statutory or punitive damages. Nonetheless, the one circuit court to directly address the issue concluded that the FCRA does not permit consumers to seek injunctive relief. *Washington v. CSC Credit Servs, Inc.*, 199 F.3d 263, 268-69 (5th Cir. 2000). The reporting industry's current attempt to enfeeble the § 1681n(a) standard (*see* Brief of Amicus Curiae Trans Union, LLC, at 24), after having already convinced a lower court to eliminate private injunctive relief, suggests that the reporting industry's primary objection is to Congress's choice to provide private enforcement of the FCRA.

balance at risk is the central role that Congress intended consumers to play in ensuring accuracy of credit reports. Congress gave consumers the combined tools of the adverse action notice, free credit report, and dispute mechanism, and made these tools effective by providing the private attorney general enforcement remedy. Petitioners seek to compromise this legislative design.

2. The FCRA's Private Enforcement Mechanism Is Especially Critical Given the Unique Nature and Business Model of the Reporting Industry

Ensuring vigorous private enforcement of the FCRA is especially important because the credit reporting industry is unlike most other industries in some fundamental respects. First, the clients of the consumer reporting industry are the creditors who furnish or use the information contained in the reporting agencies' databases. Most of these creditors are reporting agency subscribers, which buy the ability to both send and receive consumers' credit histories. The reporting agencies' paying customers are these creditors, not the consumers whose life experiences comprise the 600 million credit reports in the agencies' databases.

Second, consumers have no say in whether their information is included in the reporting agencies' databases. Most Americans cannot avoid having a credit history. Even consumers who do not use credit are included if, for example, they have a cell phone or an unpaid medical bill. Still, credit is a necessity for all but the very wealthy. Most people, for example, must obtain a mortgage if they want to buy a house or receive student loans if they want to attend college. Thus, unlike almost all other business relationships, consumers who are unhappy with the actions of a reporting agency cannot vote with their

feet – they cannot remove the information or take their business elsewhere.

In this way, the reporting industry is almost quasi-governmental in nature, keeping files on almost every adult American whether they like it or not. The lack of choice whether to participate in the reporting system is also similar to a consumer's relationship with a public utility, yet the consumer reporting industry is not nearly as well regulated as a public utility. Apart from the very limited resources of the FTC, the major enforcement structure to "regulate" the consumer reporting industry is the private consumer.

Thus, while creditors can choose to switch between agencies if they wish, consumers are captives of the reporting agencies. Traditional competitive market forces therefore provide little incentive for reporting agencies to incur the costs to institute new procedures that ensure information is accurate or to undertake investigations to correct errors, since these activities primarily benefit consumers. Only the FCRA itself compels such behavior. Petitioners' invitation to dilute the FCRA's statutory penalties would weaken the only realistic protection that prevents the reporting agencies from ignoring the consumers whose lives can be ruined by incorrect information.

In contrast, by construing the remedy provisions, as Congress intended, to meaningfully penalize those who choose to violate the FCRA, the FCRA provides "optimal deterrence." Michael L. Rustad, *Punitive Damages in Cyberspace: Where in the World is the Consumer?*, 7 Chap. L. R. 39, 93 (2004). "Ordinary damages are an insufficient deterrent where the gain to the defendant exceeds any compensable injury." *Id.*

3. The FCRA's Private Remedies Are Often a Consumer's Only Recourse When Information Is Misused or Erroneously Reported

In many circumstances, the § 1681n(a) damages that Petitioners are trying to restrict are the only effective remedy against a reporting agency, furnisher, or user. Consumers may not be able to redress these privacy injuries by suing in tort because Congress granted agencies, users, and furnishers qualified immunity from most such state-law causes of action. Section 1681h(e), for instance, eliminates defamation, invasion of privacy, and negligence actions except as "to false information furnished with malice or willful intent to injure such consumer." *See also* § 1681t (preempting a comprehensive list of state laws).

Criminal liability is virtually nonexistent, except under § 1681q (knowingly and willfully obtaining information from a consumer reporting agency under false pretenses) and § 1681r (applying only to the reporting agencies' employees). The general criminal provision (§ 1681q) originally was interpreted by the courts to allow civil recovery under 1681n. *See e.g. Zamora v. Valley Federal S&L Ass'n*, 811 F.2d 1368, 1370 (10th Cir. 1987). In 1996, Congress endorsed that approach when it copied the § 1681q "knowingly and willfully" language wholesale into § 1681n(a)(1)(B).

4. Petitioners Deliberately Took a Calculated Risk When They Ignored the Contrary FTC Staff Opinion

Amici have no special interest in the resolution of Petitioners' culpability in this matter once the Court establishes the standard for willfulness. It is striking, however, that Petitioners seek to present this case as nothing more than an innocent, harmless, and good faith

disagreement over an arcane and irresolvable (at the time) question of law for which their mistaken choice of one reasonable interpretation over another should not result in penalty damages. GEICO Brief, at 1-2. The available evidence, in fact, suggests another reasonable conclusion: that Petitioners knew their "interpretation" of § 1681a(k)(1)(B)(i) was not credible but decided to ignore the March 1, 2000, FTC staff opinion and their own internal candid assessment to the contrary, using the guise of plausible legal deniability in order to overcharge their customers and conceal the truth from them.

Under the CCPA, courts reject attempts like those of Petitioners to use self-induced errors of law to justify engaging in sharp business practices, absent determination by the trier of fact on the issues of good faith, knowledge, motive, and intent. *See Johnson v. Riddle*, 443 F.3d 723, 727-32 (10th Cir. 2006) (reversing grant of summary judgment under the FDCPA on debt collector's good faith, mistaken error of law defense to collecting excess charges). Furthermore, Petitioners' decision to ignore an FTC staff opinion squarely on point is a troubling and irresponsible practice that cannot be countenanced and that must be undertaken only at the actor's peril. Petitioners were on notice of the proper meaning of § 1681a(k)(1)(B)(i) and made a conscious decision to disregard it. Indeed, GEICO initially fully complied with § 1681a(k)(1)(B)(i) but actually abandoned that policy in favor of non-compliance. (Brief of the United States as Amicus Curiae, at 4). As the Court said long ago in the general context of consumer protection, "it does not seem 'unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.'" *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 393 (1965) (quoting *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340 (1952)).

5. The Industry Can Show No Harm From Enforcement of FCRA Penalty Damages

Petitioners and their Amici cannot point to a single example where a final award of § 1681n(a) statutory or punitive damages has been even arguably excessive. Their stated fears and alarmist claims of mammoth awards instead are speculative at best, have no foundation in fact, and present no basis for the Court to take the preventive action to undercut § 1681n(a) that these unfounded claims are calculated to promote. If Petitioners' position is sustained, the participants in the consumer reporting industry will be given a green light to conduct business with little concern about meaningful private enforcement of statutory duties and no concern for the kind of enforcement that would deter violations or encourage compliance.

Given the nature of the injury to privacy, the importance of accurate credit reports, and the near exclusivity of the FCRA's remedies, any weakening of § 1681n(a) remedies would dissuade reporting agencies, furnishers, and users from valuing consumer privacy and instead would encourage strategic behavior to flout the FCRA's protections, as Petitioners may have done here. Minimizing the consequences for violating the FCRA would upset the balance between commerce and privacy that Congress sought to strike and would dissolve the legal barriers consumers have against prying eyes that want to view and exploit their individual information without any entitlement to do so. Consumers would be left with mere paper rights.

C. Vigorous Private Enforcement is Essential Because the Big Three Have Failed to Take Steps to Abate Inaccurate Reporting

1. The Credit Reporting System is Rife with Errors

Unfortunately, despite the intent of Congress in enacting the FCRA, the consumer reporting system does

not provide accurate information to its users. In the deliberations that culminated in the 1996 FCRA amendments,[6] Congress was presented with staggering statistics that nearly half of all credit reports (48%) maintained by the Big Three contained inaccurate information and nearly one out of five (19%) contained errors that could adversely affect the consumer's eligibility for credit. S. Rep. 103-209, at 3. More recent information shows a remarkable lack of improvement. Nat'l Ass'n of State PIRGs, *Mistakes Do Happen: A Look at Errors in Consumer Credit Reports* 11 (2004) (revealing that 25% of credit reports studied contained "serious errors").[7]

Despite the extraordinary economic and personal benefits at stake, the Big Three conduct their business with far too little regard for the inordinate personal price of their failure or for the mandates imposed by Congress to cure the agencies' shortcomings. *See, e.g., Ruffin-Thompkins v. Experian Info. Solutions, Inc.*, 422 F.3d 603, 610-11 (7th Cir. 2005) (noting the court's sympathy with the consumer's "frustration" and identifying Experian's "systemic problem" in resolving consumer disputes); *Cushman v. Trans Union Corp.*, 115 F.3d 220, 224-26 (3d Cir. 1997) (criticizing inadequate reinvestigation procedures); *Federal Trade Comm'n v. TRW Inc.*, 784 F.Supp. 361 (N.D. Tex. 1991) (entering a comprehensive consent order attempting to correct systemic FCRA noncompliance). The combined tools of adverse action notice, free

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[6] Consumer Credit Reporting Reform Act of 1996, Title II, Subtitle D, Ch. 1, of the Omnibus Consolidated Appropriations Act for Fiscal Year 1997 (Pub. L. No. 104-208) (Sept. 30, 1996).

[7] Available at <http://uspirg.org/home/reports/report-archives/financial-privacy – security/financial-privacy – security/mistakes-do-happen-a-look-at-errors-in-consumer-credit-reports>.

credit report, and dispute procedures are designed to correct these deficiencies.

2. The Reporting Industry Has Done Nothing to Fix Preventable Errors

The principal sources of the massive erroneous reporting are notorious and readily categorized: errors occur overwhelmingly as a result of 1) inaccurate information provided to the reporting agencies by furnishers, 2) the reporting agencies' over-inclusive matching algorithms that merge the profiles of two consumers with similar personal identifiers, and 3) an appalling indifference by the consumer reporting agencies to these known, preventable, and eminently correctable problems.

Significant impediments to correcting embedded erroneous information exist in the consumer reporting system. One defect of the consumer reporting system is the failure of the Big Three to exercise virtually any quality control over the information initially provided to them by furnishers. Until and unless a consumer lodges a formal dispute challenging the accuracy of information already published, the Big Three blindly rely on furnishers and provide no oversight of the quality of the information being reported. *See Henson v. CSC Credit Servs.*, 29 F.3d 280, 284 (7th Cir. 1994).

This unquestioning acceptance and re-publication of furnisher information invites abuse. A well known truism is that reporting a debt to a reporting agency is a "powerful tool designed, in part, to wrench compliance with payment terms from" the alleged obligor. *Rivera v. Bank One,* 145 F.R.D. 614, 623 (D.P.R. 1993). In light of the available financial rewards, it is not surprising that some creditors are content to "slam" an innocent consumer's credit report, that is, furnish wrong information to reporting agencies to pressure a non-obligor to make payment

for the debtor who is actually responsible. *E.g., Johnson v. MBNA America Bank, NA,* 357 F.3d 426, 428-29 (4th Cir. 2004).

Another recurring furnisher abuse that results in inaccurate reporting is the "re-aging" of obsolete debts. This problem has grown particularly prevalent and profitable in recent years with the emergence of a multi-billion dollar distressed debt industry that buys, sells, and re-buys large portfolios of defaulted and time-barred debt for pennies on the dollar and then duns vulnerable consumers for inflated sums. The FCRA requires most consumer debts to be deleted from a credit report after seven years from the date of charge-off. § 1681c(a)(4). "Re-aging" occurs when these "scavenger" debt buyers purposefully misrepresent the date of charge-off to fall within the seven-year period, thereby resurrecting long dormant and nearly worthless debts with the simple act of false credit reporting. The FTC has tried to rein in this practice,[8] but the "re-aging" abuse continues at astounding levels.

Additional erroneous credit reporting results from the practice of merging the reports of two (or more) consumers with similar identifying information. This problem has plagued the reporting agencies since the FCRA was enacted, if not earlier. *See Thompson v. San Antonio Retail Merchants Assoc.*, 682 F.2d 509, 510-13 (5th Cir. 1982) (per curiam) (reporting agency negligently mixed the files of plaintiff William Douglas Thompson, III, with William Daniel Thompson, Jr.) In the 25 years since the problem

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[8] The FTC has brought enforcement actions over re-aging against two debt collectors, including one of the nation's largest debt collection firms. *United States v. NCO Group, Inc.*, Civ. No. 922-3012, *see* <www.ftc.gov/opa/2004/05/ncogroup.htm>, and *United States v. Performance Capital Management* (Bankr. C.D. Cal 2000), *see* <www.ftc.gov/opa/2000/08/performance.htm>.

was publicly identified as a systemic flaw, the Big Three have refused to correct their computer programs that decide how to link an individual consumer with the information maintained in their databases to create an actual credit report. *Federal Trade Comm'n v. TRW Inc.*, 784 F.Supp. at 362-63.

All three reporting agencies' systems are programmed to sort the information received from their 40,000 furnishers into a single credit report belonging to one individual whenever two of four designated identifiers associated with the data match: name, address, social security number, or date of birth. The systemic problem is that the Big Three use a "partial matching logic" that does not require an actual match of these identifiers but only a match of similar information. For example, this "partial matching logic" associates an individual with data when only seven of nine digits in a social security number match. This decision to identify a person based on only seven of nine numbers is particularly counterproductive since the social security number is the only truly unique identifier among the four. Merely requiring a full social security number match could end the mixed file phenomenon, still the Big Three refuse to implement even an eight of nine matching protocol.

In addition, the "partial matching logic" matches addresses with no more than the same state of residence and considers names to match by discounting variations such as spelling, middle names or initials, common nicknames, generational designations (Jr., Sr., III, etc.), and even completely different last names (to accommodate name changes after marriage). *See Apodaca v. Discover Fin. Servs.*, 417 F.Supp.2d 1220, 1224 (D.N.M. 2006). This "partial matching logic" literally invites the computer to combine the credit reports of two individuals into one. *See McKeown v. Sears Roebuck & Co.*, 335

F.Supp.2d 917, 924-27 (W.D. Wis. 2004) (documenting plaintiff James McKeown's ordeal to correct reporting agencies' file merger with deceased consumer James N. McOwen). Simply tightening the matching algorithms would eliminate an entire class of faulty reporting and enhance the accuracy that is so important to our credit system.

Readily identifiable inconsistencies on the face of individual credit reports instantly expose errors, yet recent cases have revealed that the reporting agencies have suppressed the fact that there are "easily available . . . procedure[s] that would greatly improve accuracy at a minimal cost." *O'Brien v. Equifax Info. Servs., LLC*, 382 F.Supp.2d 733, 739 (E.D. Pa. 2005).[9] Because the Big Three avoid implementing these and other reforms, the role of consumers acting to protect themselves is more crucial than ever. The adverse action notice is precisely tailored to this end.

3. The Consumer Reporting System Itself Has Exacerbated the Current Identity Theft Crisis

In 2003, Congress amended the FCRA by enacting the Fair and Accurate Credit Transactions Act (FACTA), Pub. L. No. 108-159 (2003). Title I of FACTA, entitled Identity Theft Prevention and Credit History Restoration, addresses the identity theft crisis that in Congress's judgment had "reached almost epidemic proportions in recent years." H.R. Rep. No. 108-263, at 25 (Sept. 4, 2003). The most important new FACTA duties imposed on

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[9] The *O'Brien* litigation revealed that the reporting industry had available the precise capability that Experian had refused to use in *Sarver v. Experian Information Solutions*, 390 F.3d 969 (7th Cir. 2004).

the reporting agencies are not proactive and instead are triggered only when consumers notify an agency of suspected fraud. *See, e.g.*, 1681c-1 and c-2. As a result, the Big Three unfortunately continue to ignore facially conflicting information that could identify a compromised credit report, particularly the anomalous billing address that must be established to commit and conceal the fraud.

Theft of identity occurs when an impostor poses as someone else and applies for and receives credit on the basis of another's good credit standing. The impostor then makes purchases, obtains credit cards, and takes out loans using the dishonestly obtained credit approvals that are all too easily obtained and leaves the victim facially responsible for the resulting financial obligations. Worse yet, the scam saddles victims with the arduous process of ascertaining what happened to them and of obtaining information to prove their innocence and to restore their good names. Aside from the dollar costs to businesses and individuals, one scholar estimates that consumers have lost nearly 600 million hours resolving identity theft problems over the last two years, contributing to the crime's "drag on the economy." Gary M. Victor, *Identity Theft, Its Environment and Proposals for Change*, 18 Loyola Consumer L. R. 273, 279 & n.34 (2006).

The ease with which impostors steal the identity of innocent victims is common knowledge and illustrates the allure of the scam. Typically, to obtain credit, impostors need only use the victim's social security number, while using a similar but different name and completely different remaining identifying information. Impostors use an alternate address (sometimes simply a mail drop) to receive the purchased items, credit cards, and billing statements. Victims therefore receive no notice that a

problem exists until they receive an FCRA and/or ECOA adverse action notice or are dunned for payment for the impostor's debts many months or even years later.

Concealing the fraud is essential to the thief. On average victims discover identity theft after 15 months, and at least 20% only learn of the problem after two years.[10] Even then, the victim still must determine what has transpired, often waiting weeks and months just to receive documents providing information about the accounts. This protracted process further prevents victims from taking remedial action and continues the nightmare as victims deals with demanding debt collectors and disbelieving creditors.

Information received by the reporting agencies almost always shows early evidence of obvious errors and indicia of fraud that the Big Three nevertheless ignore. The victims' records contain conflicting information, with one set revealing their real accounts, accurate addresses, and continued positive credit usage, and the other showing overused accounts with a lack of payments opened in a short time span, as well as the ever-present anomalous billing addresses. Still, Amici have seen no evidence that the Big Three have taken any action to use their comprehensive databases and state of the art computing power to effectively combat this scourge. Indeed, the Big Three have turned identity theft into a profit center to sell their credit-monitoring

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[10] *See* Federal Trade Commission, *Identity Theft Victim Complaint Data, Figures and Trends November 1999 through March 2001*, available at <http://www.consumer.gov/idtheft/reports/rep-mar01.pdf> and <http://www.consumer.gov/idtheft/charts/nov99-mar01.pdf>.

services that instead should be implemented as part of their core responsibilities to protect consumers' privacy.[11]

Significantly, although the Big Three disclose to users a consumer's file contents based merely on a purported match of a social security number, they do not disclose the file to consumers without additional indicia of proper identification. *See* § 1681h(a)(1). Given their parallel obligation pursuant to § 1681e(a) to provide reports only to users who have a legitimate purpose involving the subject consumer, one would have expected that these agencies would follow protocols with a similar level of scrutiny. *See* § 1681b(a). They do not. This "weakest link" creditor point of entry into the reporting system is all too well known to identity thieves, making the reporting system itself a target of opportunity.

D. Providing the Adverse Action Notice Here Will Ensure That Petitioners Do Not Keep Their Customers in the Dark When Congress Intended to Shed Light

The linchpin of the consumer oversight on which Congress built FCRA compliance is the adverse action notice. The notice is a direct link to the formal dispute process through which consumers may correct erroneous

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[11] As stated in the New York Times current series on identity theft, "It is not just criminals who are profiting from identity theft; financial institutions are making money, too. Fear of identity theft has helped give rise to a nearly billion-dollar business in credit-monitoring services sold by the major credit bureaus – companies like Equifax, Experian and TransUnion – as well as direct marketers and banks." Eric Dash, *Protectors, Too, Gather Profits From ID Theft*, December 12, 2006, available at <http://www.nytimes.com/2006/12/12/business/12credit.html?ref=nationalspecial2>.

information. § 1681i(a). The notice not only apprises consumers of the adverse action taken and thus the possibility of negative information on their report, but also must disclose the right to receive a free credit report from the responsible reporting agency under § 1681j(b) and summarize the process to initiate the formal dispute mechanism with the agency. § 1681m(a)(1)-(3). The FACTA amendments of 2003 placed an even greater emphasis on consumers' receipt of the adverse action notice that Petitioners now claim the FCRA does not mandate.

The adverse action notice is particularly important because, as discussed above, the consumer reporting system is plagued by errors. Failure to give the adverse action notice that Congress mandated to alert consumers to potential problems means that fewer errors are corrected and more unreliable information is disseminated to users.

Only when a consumer first finds inaccurate or incomplete information and then lodges a formal dispute with the reporting agency can errors realistically be corrected. § 1681i(a). The required notice of dispute to the furnisher from the reporting agency then triggers the furnisher's duty to conduct its own reasonable investigation of the challenged information and report the results back to the reporting agency under § 1681s-2(b). *See Johnson v. MBNA America Bank*, 357 F.3d at 429-32. Then the reporting agency must complete its own independent investigation of the dispute and finalize the remaining steps to meet its duties under § 1681i(a)-(d). Without an adverse action notice, this error correction procedure can never start.

Congress defined adverse action broadly in § 1681a(k) to advance the important public policies animating this essential consumer notification. Unlike Congress, Petitioners are unconcerned about the overall negative effect on the economy caused by inaccurate or incomplete information. Petitioners simply want to keep their customers in the dark. Petitioners apparently are not troubled that some of their customers will be denied the opportunity to know what is in their credit reports, to correct inaccurate or incomplete information, or to better appreciate their own credit habits and improve their credit status for the future.

Petitioners also show no concern that their failure to send an insurance adverse action notice will prevent some of their customers from discovering that they are victims of identity theft and from taking the immediate remedial measures that Congress deemed crucial to curbing the impact of this criminal epidemic. This notice is particularly important here since the complementary ECOA adverse action notice that is also sent when adverse action is taken in consumer credit transactions is not sent to insurance customers.[12] A significant number of Americans do not actively apply for credit on a regular basis. A great number of these individuals, however, periodically purchase insurance products, and for them the failure to

[12] As discussed in Section A.2, in addition to the FCRA, consumers have a separate right to an adverse action notice under the ECOA. § 1691(d). However, the right to a notice under the ECOA is limited to adverse action in "credit" transactions. § 1691(d)(6) (limiting ECOA adverse action to "credit" transactions). Thus, this separate right to an ECOA adverse action notice does not apply to insurance adverse action or other non-credit situations, leaving the FCRA the only basis for requiring an adverse action notice in these contexts.

receive an insurance adverse action notice would completely eliminate this theft of identity early warning system.

In addition, Petitioners are content that their customers will not learn that despite, for example, a pristine driving record, they are not receiving the best automobile insurance rate available because of a blemish on their credit report. To the contrary, Petitioners seem intent on depriving consumers of such empowering information essential to a free and efficient market. The possibility that these customers might, as Congress intended, correct or improve their credit standing is seemingly unimportant to Petitioners; and the certainty that some customers, if armed with accurate information, would take their insurance business elsewhere and pay less may well be the anti-competitive force driving Petitioners' decision not to provide adverse action notices.

E. The Framework in Which This Case Arises Does Not Represent a Typical FCRA Case

Amici wish to emphasize that the parties' debate here over willfulness in the context of the proper interpretation of the statutory adverse action definition is not representative of the usual FCRA case. Typical individual FCRA cases do not, as here, allege a disclosure violation of § 1681m(a) but focus instead on accuracy issues. Specifically, most FCRA cases that raise § 1681n(a) liability ask whether a reporting agency has breached its duty to report accurate information pursuant to § 1681e(b) or whether a reporting agency or furnisher has conducted a reasonable investigation of the accuracy or completeness of information that a consumer has specifically disputed, in violation

of § 1681i (for reporting agencies) and § 1681s-2(b) (for furnishers).

Thus, answering the question here whether "there was an objectively high risk that GEICO's construction of the law was wrong," as framed by the United States as Amicus Curiae (Brief, at 30), would not normally be appropriate in cases alleging a violation of §§ 1681e(b), 1681i, or 1681s-2(b). Instead, these cases typically ask first whether the defendant had notice or was aware of the claimed error or problem and whether it breached the duty of reasonable care to correct it; if so, a plaintiff will have established liability for negligent noncompliance under § 1681o. *See, e.g., Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333-34 (9th Cir. 1995); *Crabill v. Trans Union, L.L.C.*, 259 F.3d 662, 664 (7th Cir. 2001). Then, in order to pursue the § 1681n(a) remedies, the plaintiff must show that the defendant's breach was not merely unreasonable but was done with the requisite disregard of its duty in order to establish willfulness. *See, e.g., Soghomonian v. United States*, 278 F.Supp.2d 1151, 1160-62 (E.D. Cal. 2003); *Apodaca*, 417 F.Supp.2d at 1228-34. Whether that standard includes reckless disregard or is limited to conscious disregard is, of course, the issue before the Court; but the instant formulation of whether a defendant knew, should have known, or disregarded the risk that it was misconstruing the law would not be readily transferable to these other types of individual accuracy cases.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit should be affirmed.

Respectfully submitted,

RICHARD J. RUBIN
(*Counsel of Record*)
1300 Canyon Road
Santa Fe, New Mexico 87501
(505) 983-4418

JOANNE S. FAULKNER
123 Avon Street
New Haven, Connecticut 06511
(202) 772-0395

CHI CHI WU
National Consumer Law Center
77 Summer Street, 10th Floor
Boston, Massachusetts 02110
(617) 542-8010

ELIZABETH D. DE ARMOND
Chicago-Kent College of Law
Illinois Institute of Technology
565 W. Adams Street
Chicago, Illinois 60661
(312) 906-5172

Counsel for Amici Curiae